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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/879,631	06/11/2001	Otto H. Fischer	9275	4278
7590 10/24/2003				
Bruce H. Johnsonbaugh, Eckhoff, Hoppe, Slick, Mitchell & Anderson 505 Sansome Street, Suite 1700 Two Transamerica Center San Francisco, CA 94105			EXAMINER MADSEN, ROBERT A	
			ART UNIT 1761	PAPER NUMBER

DATE MAILED: 10/24/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	09/879,631	FISCHER ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	Robert Madsen	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1,2,4-9 and 11-15 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,2,4-9 and 11-15 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).  
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

- |   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                 | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). ____   |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)        | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s) ____ | 6) <input type="checkbox"/> Other:  |

**DETAILED ACTION**

1. The Amendment filed July 29, 2003 has been entered. Claims 3 and 10 have been cancelled, and claim 15 has been added. Claims 1,2,4-9,11-15.

***Claim Rejections - 35 USC § 112***

2. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

3. Claims 1,2,4-9,11-15 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The specification does not explain how one "intermittently" forms a cake, as recited in claim 1, or how a forming chamber means is intermittently fed, piston means intermittently feeds, or an ejection means intermittently moves, as recited in claims 8 and 15.

***Claim Rejections - 35 USC § 102***

4. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:
5. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

6. Claims 8,9,12-15 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Vogt (US 2653430).
7. See Figure 3 and 5 especially, Column 1, lines 1-38, Column 15, lines 5-69. Note the enwrapment may be a bag in Column 14, lines 50-52. Note that the apparatus is capable to operating intermittently since feed mechanism can stop automatically from time to time (Column 5, line 40 to Column 6, line 12).
8. Claims 8,9,12-15 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Focke et al. (US 5174088).
9. See Column 1, line 40 to Column 2, line 27, Column 5, lines 50-58. Note the apparatus operates synchronously, and any point stop encountered at any point along the process results in a stop throughout the entire process. Thus the apparatus can operate intermittently without disrupting the general flow of materials (can be simultaneously stopped and simultaneously started).
10. Claims 8,9,12-15 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Russell (US 3889448).
11. See Figures 1-4, Column 2, lines 3-32, Column 3, lines 3-63, and Column 4, lines 12-16. It is noted that Russell does teach a movable and adjustable metering shoe which is movable between a first and second positions and having an end wall which in said first position of said movable metering shoe is one surface of said forming chamber means as described in Column 3, lines 3-32 and shown in Figure 2 (e.g. item 17).

Additionally described in Column 3, lines 3-32, the metering shoe is operated by a pressure-adjusted piston (i.e. a piston feed means) that controls the backpressure of the feed, and thus provides a means for compressively feeding the product. The operation is intermittent in that one chamber is filled at a time.

12. Claims 8,13-15 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Long (US 5987858).

13. See Figures 6-17, Column 1, lines 9-23, Column 6, lines 15-51, Column 5, line 10 to Column 7, line 17.

14. It is noted that Long does teach a movable and adjustable shoe, which is movable and forms a surface of the forming chamber (item 72 shown in Figures 12-14 especially, and described in Column 6, line 59 to column 7, line 1). The operation is intermittent in that one chamber is filled at a time.

***Claim Rejections - 35 USC § 103***

15. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

16. Claims 1,2, 4-6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Burton et al. (US 4326568) in view of Luthi et al. (US 3026660)

17. Regarding claims 1,2,4 Burton et al. teach a method for automatically packing non-flowing meat chunks intermittently (Column 1, lines 5-15), compressively forming a cake in an individual forming chamber using a metering shoe (i.e. plunger), and

ejecting the cake into the pouch as recited in claim 1, wherein the method comprises a multiposition turret moving to a first position to compress and a second position to align with the pouch as recited in claim 2, and the movable metering shoe moves downwardly to eject the cake as recited in claim 4 (Column 1, lines 17-55, Column 3, lines 8-20, Column 4, lines 5-30, Column 4, line 58-Column 5, line 6, Figure 1, 16-18). Although Burton et al. teach including a mechanism for charging the forming chamber with a precisely predetermined quantity, Burton et al. are silent in teaching periodically adjusting the metering shoe to change the size of the forming chamber to achieve a desired cake weight as recited in claim 1.

18. Luthi et al. also teach automatically packing non-flowing meat chunks, compressively forming a cake in a forming chamber (i.e. metering container 16) using a metering shoe (i.e. plunger 17), wherein a multiposition turret is used. Also like Burton et al., Luthi et al. also include a mechanism for charging the forming chamber with a precisely predetermined quantity (Column 1, line 10 to Column 2, line 4, Column 2, lines 40-70). Luthi et al. teach the meat chunks have a varying density, which does not allow for a precisely determined quantity of meat to be dispensed into the forming chamber, and providing a *constant* metering shoe stroke distance (i.e. a constant chamber size) would result in a varied filling size. Luthi et al. periodically changes the metering shoe stroke distance (i.e. changing the size of the forming chamber) to compensate for the varying density so that the weight of the compressed meat is constant. Luthi et al. teach a pneumatically operated metering shoe with a constant pressure applied will

assure allow the stroke distance to change as a result of the meat density (Column 7, line 34 to Column 8, line 18).

19. Therefore, it would have been obvious to modify Burton et al. and vary the size of the forming chamber since Luthi et al. teach this will compensate for any variability seen in meat chunk density. One would have been substituting one a method for charging the forming chamber with a precisely predetermined quantity for another for the same purpose: forming meat chunks.

20. Regarding claims 5 and 6, Burton et al. teach the metering shoe moves between a retracted fill and ejection position and the forming chamber lies in a fixed position above the pouch, such that the metering shoe moves vertically downward to eject the compressed meat chunks into the pouches (Figure 2 in view of Figure 1, note that forming chamber 30 moves with dispensing unit 72, which includes plunger 77).

21. Claim 7 is rejected under 35 U.S.C. 103(a) as being unpatentable over Burton et al. (US 4326568) in view of Luthi et al. (US 3026660), as applied to claims 1,2,4-6, above, further in view of Bullock et al. (US 4330252).

22. Burton et al. teach moldable meat chunks, but are silent in teaching tuna fish. Bullock et al. are relied on as evidence of the conventionality of tuna chunks being a moldable packaged meat (Abstract, Column 1, lines 8-58). Therefore, it would have been obvious to also include tuna fish in the method of Burton et al. since one would have been substituting one type of compressible meat chunk for another in a packaging process.

23. Claim 11 is rejected under 35 U.S.C. 103(a) as being unpatentable over Vogt (US 2653430), as applied to claims 8,9,12-15 in view of Bullock et al. (US 4330252).

24. Vogt teaches moldable food products packaged in pouches, but is silent in teaching tuna fish. Bullock et al. are relied on as evidence of the conventionality of tuna chunks being a moldable packaged food (Abstract, Column 1, lines 8-58). Therefore, it would have been obvious to also include tuna fish in the apparatus of Vogt since one would have been substituting one type of compressible food for another in an apparatus used to package compressible foods.

#### ***Response to Arguments***

25. Applicant's arguments filed July 29, 2003 have been fully considered but they are not persuasive.

26. With respect to applicant's arguments that Vogt and Flocke et al. do not teach an apparatus for a non-flowable product, it is noted that the Vogt and Flocke et al. teach the recited structure. Furthermore, "[e]xpressions relating the apparatus to contents thereof during an intended operation are of no significance in determining patentability of the apparatus claim." (Ex parte Thibault, 164 USPQ 666, 667 (Bd. App. 1969)), and "[i]nclusion of material or article worked upon by a structure being claimed does not impart patentability to the claims." (In re Young, 75 F.2d 966, 25 USPQ 69 (CCPA 1935) (as restated in In re Otto, 312 F.2d 937, 136 USPQ 458, 459 (CCPA 1963))).

27. Applicant also argues that Vogt and Flocke et al. do not teach intermittently operating the apparatus. However, this limitation does not introduce any new structure



to the claimed apparatus, and these references teach all the structural limitations of the apparatus claims. In fact since Flocke et al. teach the apparatus operates synchronously and Vogt teaches an automatic stop when there is a lack of feed, they both imply that the equipment is capable of starting and stopping the process, which would be required for an intermittent process. Applicant is reminded that a "recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus" (Ex parte Masham, 2 USPQ2d 1647 (Bd. Pat. App. & Inter. 1987)).

28. Applicant argues that Russell and Long do not teach the recited apparatus because they do not teach an apparatus for a non-flowable product. However, the recited apparatus features do not differ from Russell or Long other than the *intended* use. "Expressions relating the apparatus to contents thereof during an intended operation are of no significance in determining patentability of the apparatus claim." (Ex parte Thibault, 164 USPQ 666, 667 (Bd. App. 1969)), and "[i]nclusion of material or article worked upon by a structure being claimed does not impart patentability to the claims." (In re Young, 75 F.2d 966, 25 USPQ 69 (CCPA 1935) (as restated in In re Otto, 312 F.2d 937, 136 USPQ 458, 459 (CCPA 1963))).

29. Applicant also argues that both Russell and Long teach feed mechanism that are incompatible with tuna fish, however the feed mechanism recited in the claims does not exclude any particular type of feeder.

***Conclusion***

30. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Miller et al. (US 3096540) teach meat chunks filled using a adjustable metering shoe on a turret.

31. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

32. A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

33. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (703)305-0068. The examiner can normally be reached on 7:00AM-3:30PM M-F.

34. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703)308-3959. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

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35. Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0061.

Robert Madsen  
Examiner  
Art Unit 1761



MILTON I. CANO  
SUPERVISORY PATENT EXAMINER  
TECHNOLOGY CENTER 1700